

SECTION 9

Death Benefits

DIGESTS

In General

The Board holds that the administrative law judge erred in awarding employer a credit under Section 3(e) for amounts specifically awarded under Connecticut law for decedent's lifetime claim against Section 9 benefits awarded to claimant, decedent's widow. Pigott v. General Dynamics Corp., 23 BRBS 30 (1989).

Board affirms the administrative law judge's finding that the U.S. Department of Labor had jurisdiction to adjudicate this claim because although decedent's death occurred after the effective date of the 1979 D.C. Workers' Compensation Act, claimant's cause of action for death benefits is preserved under the general savings statute because employer became liable for death benefits in 1975 when decedent became permanently totally disabled by his work-related injury. Also, it is irrelevant under Section 9 as amended in 1972 that decedent's death was unrelated to his work disability since he was permanently totally disabled at the time of his death. Lynch v. Washington Metro. Area Transit Auth., 22 BRBS 351 (1989).

The Board held that the 1928 D.C. Act applied in the instant case given the fact that claimant had no other remedy available to her, *citing Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69 (CRT)(D.C. Cir. 1990). In light of *Gardner*, the Board stated that its decision in *Lynch*, 22 BRBS 351, a case with similar facts, could not be the basis for its decision in this case. The Board stated that: a) since decedent's death was unrelated to the work injury there was no remedy for claimant under the new 1982 D.C. Act; b) since at the time of decedent's death he was permanently totally disabled and had no employment contacts with D.C. after 1982, there is no subject matter jurisdiction under the new D.C. Act; and c) since the injury that caused decedent's death occurred in Washington, D.C. and his death was unrelated to the injury, it would not be covered under any other state workers' compensation act. In light of the above factors, therefore, and because claimant had a remedy under Section 9 of the 1972 Longshore Act, the Board affirmed the deputy commissioner's award under the 1928 Act. Finally, the Board noted that this remedy is available to claimant only because the 1984 Amendments, which eliminated recovery for deaths unrelated to the work injury do not apply to D.C. Act cases. *Holden v. Shea, S & M Ball Co.*, 23 BRBS 416 (1990), *aff'd sub nom. Shea, S & M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170 (CRT)(D.C. Cir. 1991).

On the facts of this case, claimant, the widow of a deceased employee, had the option of pursuing benefits under Section 9 as it existed prior to the 1984 Amendments based on either her husband's death from an asbestos-related condition or his having been permanently totally disabled at the time of his death due to a work-related back injury. The United States Court of Appeals for the D.C. Circuit affirmed the Board's decision that a widow of an employee who was injured while the 1928 Act was in effect but who died of causes unrelated to that work-related injury after the 1979 D.C. Act went into effect is eligible to receive death benefits under the 1928 Act. *Shea, S & M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170 (CRT)(D.C. Cir. 1991), *aff'g Holden v. Shea, S & M Ball Co.*, 23 BRBS 416 (1990).

Board holds that Section 9 as amended in 1984 is not applicable where the employee's death occurred prior to September 28, 1984 (see Section 28(d) of the 1984 Amendments). Swasey v. Willamette Iron & Steel Co., 20 BRBS 52 (1987).

The employee's survivor is entitled to death benefits only if the employee's death is due to a work-related injury or if the employee was permanently totally disabled due to work-related injury prior to death. Since the Board reverses administrative law judge's finding that the employee's condition was permanent at the time of his death, it also reverses the award of death benefits. Dixon v. John J. McMullen & Assocs., Inc., 19 BRBS 243 (1986).

Board affirms administrative law judge's finding that at the time of his death, the employee's work-related leg disability was permanent and total based upon Dr. Bhupathi's opinion and because employer failed to introduce evidence of suitable alternate employment. Board therefore also affirms the award of death benefits. Mills v. Marine Repair Serv., 21 BRBS 115 (1988), modified on other grounds on recon., 22 BRBS 335 (1989).

The Board reverses administrative law judge's finding that the employee's back disability was temporary at the time of his death and remands for a determination as to the extent of the employee's permanent disability, rejecting the administrative law judge's conclusion that it is not possible to determine the extent of a deceased employee's disability following his death, or for employer to establish the existence of suitable alternate employment subsequent to his death. Eckley v. Fibrex & Shipping Co., Inc., 21 BRBS 120 (1988).

The Board affirms the administrative law judge's finding that claimant is not entitled to death benefits under Section 9, as amended in 1972, where the employee died from causes unrelated to his work injury and claimant failed to satisfy her burden of proving that decedent's work-related injury resulted in permanent total disability at the time of his death. Decedent settled his claim based on permanent partial disability prior to his death and none of the medical reports establish that decedent could not perform his usual longshore employment due to his work-related injury at the time of his death. Abercumbia v. Chaparral Stevedores, 22 BRBS 18 (1988), aff'd on recon., 22 BRBS 18.4 (1989).

Board affirms the administrative law judge's finding that the widow's claim was timely filed under Section 13 because it was filed while voluntary Section 9 death benefits were being paid to her two minor children. There is no requirement in Section 13 that payments to a specific survivor toll time limits only with regard to that individual. Lewis v. Bethlehem Steel Corp., 19 BRBS 90 (1986).

The Board affirms administrative law judge's determination that claimant is not entitled to Section 10(f) adjustments on her death benefits, finding Dr. Thompson's opinion sufficient to support the administrative law judge's finding that decedent's death was not causally related to his employment. Section 10(f) adjustments on death benefits are only available where decedent's death is found to be causally related to his employment. Bingham v. General Dynamics Corp., 20 BRBS 198 (1988).

The Board applied Section 9, as amended in 1972, to a death benefits claim where the death occurred in 1965, prior to the date of enactment of the 1972 Amendments. The Board concluded that the right to death benefits did not arise in 1965, the date of death, as the relationship between the employee's death and his occupational asbestos exposure was not determined until 1982, and under the law in effect in 1965, claimant would have been entitled to no compensation. See Aduddell, 16 BRBS 131. Rather the cause of action for death benefits accrued on September 28, 1984, the enactment date of the 1984 Amendments. Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989).

The Board rejected employer's contention that a widow's claim for death benefits under Section 9 abates if she dies prior to the adjudication of her claim, and affirmed the administrative law judge's finding that the award passed to the widow's estate rather than abated upon her death. Hickman v. Universal Maritime Serv. Corp., 22 BRBS 212 (1989).

Where the administrative law judge had the option of awarding death benefits based on either decedent's having died from an asbestos-related condition or his having been permanently totally disabled at the time of his death due to a work-related back injury, the Board, in a case of first impression, affirmed the administrative law judge's award of death benefits based on decedent's permanent total disability at the time of his death. Where both theories are applicable, as in this case, there is no language in the Act that affords priority to one theory of recovery or the other, and here the administrative law judge found that awarding death benefits based on decedent's having been permanently totally disabled at the time of his death was in claimant's best interest, in that her recovery was greater than it would have been had benefits been awarded based on decedent's work-related death. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

The Board holds that where an employee's death occurs after the enactment date of the 1984 Amendments, *i.e.*, September 24, 1984, the provisions contained in Section 9 as amended in 1984 are applicable to a claim for death benefits; accordingly, in such cases, death benefits are awardable only where a work-related injury causes death. The Board distinguished *Lynch v. Washington Metropolitan Area Transit Authority*, 22 BRBS 351 (1989), and *Holden v. Shea, S & M Ball Co.*, 23 BRBS 416 (1990), *aff'd sub nom. Shea, S & M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170 (CRT) (D.C. Cir. 1991), as the issue in those cases was the effect of the repeal of the 1928 District of Columbia Worker's Compensation Act. In this case, Section 9 of the Longshore Act was not repealed, but amended in 1984. Thus, the Board rejected claimant's contention that since decedent's injury had occurred under the pre-Amendment Act, the General Savings Statute entitled her to the rights and benefits afforded claimants covered under Section 9 as amended in 1972. Therefore as it was uncontroverted that the employee's death in 1986 was unrelated to his employment with employer, claimant was not entitled to death benefits under Section 9, as amended in 1984. *Close v. International Terminal Operations*, 26 BRBS 21 (1992).

In a case arising in the Fourth Circuit, where decedent had an 18 percent permanent partial disability due to asbestosis and died from a cerebellar hemorrhage, with interstitial lung disease and asbestosis listed as "other significant conditions," the Board followed the holding in *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1981), that "to hasten death is to cause it." The Board noted that in a black lung case, *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BRBS 2-90 (4th Cir.), the court adopted this rule. The Board rejected employer's attempts to have the rule abandoned or narrowed. Thus, as asbestosis played some role in decedent's death, the administrative law judge's award of death benefits was affirmed. *Fineman v. Newport News Shipbuilding &*

Dry Dock Co., 27 BRBS 104 (1993).

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Where claimant-widow received increased compensation payments on behalf of her son for the period her son attended a non-accredited high school after he reached the age of eighteen, the Board ruled that any overpayments employer made to claimant on behalf of her son be credited against its future compensation liability to claimant, pursuant to Section 14(j). Contrary to claimant's contention, the Board held that Section 9(b) provides for the payment of one death benefit where a decedent is survived by a spouse, including additional compensation for surviving children, and thus, this case does not contain two separate death claims. *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

Funeral Expenses

The Board holds that administrative law judge erred in assessing funeral expenses against the Special Fund pursuant to Section 8(f). Section 8(f) was only intended to limit employer's liability for periodic payments of compensation and funeral expenses are not included within the class of compensation for which the Special Fund could be liable under Section 8(f). Board therefore held that employer was liable for these expenses. *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988); see also *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

Interest is due on untimely paid funeral expenses, as funeral expenses are included in the term "compensation." 33 U.S.C. §902(12). *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

Survivors

Board holds that employer has no standing to challenge the constitutionality of Section 9(b), since employer does not have an identity of interest with the person whose rights are violated (an unidentified widower). Denton v. Northrop Corp., 21 BRBS 37 (1988).

Board states that Section 2(11) cannot be construed as limiting compensation for death to only a situation where the death was work-related, given that Section 9, as amended in 1972, which is applicable in this case, provides that an employee's death is also compensable where he died from causes unrelated to his work injury but had been permanently and totally disabled by the work injury as of the time of his death. Board accordingly holds that the deputy commissioner did not err in imposing a Section 44(c)(1) assessment on employer despite the fact that claimant's death was not work-related, since both prerequisites to Section 44(c)(1) applicability -- a compensable death and the absence of any survivor eligible to receive death benefits--have been met in this case. Swasey v. Willamette Iron & Steel Co., 20 BRBS 52 (1987).

The Board affirmed the administrative law judge's finding that claimant, who is 18 years old and not a student, was not a "child" within the meaning of Section 2(14) because she was not "wholly dependent" on the employee at the time of the employee's injury pursuant to Section 9(f) because part of her support was derived from public welfare funds. Doe v. Jarka Corp. of New England, 21 BRBS 142 (1988).

Where decedent's son, age 34, had been afflicted with polio, lived at home, and was incapable of self-support, and where decedent had paid for almost all of his son's living expenses, the Board held that the administrative law judge properly found that the son was wholly dependent upon decedent and incapable of self-support, and therefore is a "child" within the meaning of Section 2(14) entitled to death benefits under Section 9(b). In so holding, the Board noted its agreement with the administrative law judge's finding that the son's receipt of Social Security benefits in the amount of \$97.33 a month was an inconsequential amount of independent income, insufficient to preclude him from being "wholly" dependent on decedent. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

As neither decedent's mother nor sister resided with, or received financial support from him, they are not entitled to recovery under the Act as dependents. *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995).

The Board reversed the administrative law judge's finding that decedent's adult disabled daughter was not a "child" within the meaning of Section 2(14). The administrative law judge concluded that the daughter was not "wholly dependent" on decedent at the time of his injury pursuant to Section 9(f) because the funds expended by decedent for his daughter's support were repaid after his death. The Board held that the administrative law judge's characterization of the support as a loan was not supported by substantial evidence and that, moreover, if, at the time of decedent's injury, the daughter was wholly dependent on the monies received from decedent to meet the necessities of life, this "wholly dependent" status would be unaffected by any promise to repay the funds. The Board further reversed the administrative law judge's alternate finding that the daughter would have lost her status as a "child" under the Act at the time, subsequent to decedent's death, that she received money from the sale of her house and Social Security disability benefits. The Board held that once "wholly dependent" status is established, as of the time of decedent's injury, a wholly dependent individual may lose her status as a "child" only through a change in her capacity for self-support. *Lucero v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 261 (1990), *aff'd mem. sub nom. Kaiser Aluminum & Chemical Corp. v. Director, OWCP*, 951 F.2d 360 (9th Cir. 1991).

The Board reversed the administrative law judge, holding that pursuant to Section 2(16), an employee's surviving widow (or widower) is entitled to death benefits pursuant to Section 9 if she (or he) was married to decedent at the time of his death. Under those circumstances, contrary to the administrative law judge's finding, claimant is not required to show that she (or he) was dependent upon decedent at any time, rendering Section 9(f) inapplicable. The Board noted that Section 2(16) is to be interpreted as providing alternative bases of recovery. *Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991).

The Board affirmed the administrative law judge's finding that claimant was ineligible to recover death benefits as a widow under Section 9(b). The Board first held that the administrative law judge properly applied Louisiana state law to determine claimant's marital status, as opposed to federal common law. Next, as it was undisputed that claimant and decedent lived together but did not formally participate in a marriage ceremony, under Louisiana law, claimant failed to establish that she was decedent's wife at the time of his death. The Board, however, vacated the administrative law judge's finding that claimant could not recover benefits as a dependent under Section 9(d) of the Act, and remanded the case for the administrative law judge to consider whether claimant satisfied the requirements for dependency under Section 152 of the Tax Code, as incorporated into the Act by virtue of Section 9(d), keeping in mind that Section 9(f) requires dependency issues to be determined as of the time of death. *Angelle v. Steen Production Service, Inc.*, 34 BRBS 157 (2000).

Maximum/Minimum Benefit

The Board vacates administrative law judge's Decision which was based on Aduddell, which was overruled by the 1984 Amendments. The Board holds that the survivor of a voluntary retiree whose occupational disease manifested itself under Section 10(i) more than one year after retirement, and who died from the disease, is entitled to Section 9 benefits based on the national average weekly wage calculated pursuant to Section 10(d)(2). Arganbright v. Marinship Corp., 18 BRBS 281 (1986).

Board modified the administrative law judge's award of benefits, holding that under Section 9 as amended in 1972, which is applicable to this case, claimant is entitled to 50 percent of the national average weekly wage applicable on March 1, 1982, when claimant became aware of the relationship between her husband's employment and his death. Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989).

Board construes Section 10(i) to hold that for claims involving voluntary retirees falling within Section 8(c)(23), the time of injury is determined by the date the employee becomes aware of the work-related disability; however, in a Section 9 claim for death benefits, where the decedent was a voluntary retiree, the time of injury is determined by the date the claimant is aware of the work-related death. Accordingly, the time of injury in the latter

instance cannot be prior to the employee's date of death and therefore the average weekly wage at the time of death must be used. In claims from survivors of involuntary retirees, death benefits are based on the average weekly wage of the employee at the time of injury, as Section 10(d)(2)(B) would not apply in such cases. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989).

The Board rejects claimant's contention that death benefits should be based on the compensation her husband was receiving for permanent total disability at the time of death or on the wages of a comparable employee. Because decedent died in 1986, calculation of claimant's survivor's benefits is governed by Section 9(e) as amended in 1984. As decedent's average weekly wage at the time of injury was less than the applicable national average weekly at the time of his death, the deputy commissioner correctly employed the national average weekly wage figure in computing claimant's weekly benefits. Moreover, since claimant was decedent's sole survivor, pursuant to Section 9(b), she was entitled to weekly benefits of 50% of the applicable national average weekly wage or \$148.41. The Board holds that the deputy commissioner correctly determined that claimant was entitled to receive \$148.41 in weekly benefits since this amount was less than both decedent's average weekly wage at the time of injury and the maximum benefit level under Section 6(b)(1). Buck v. General Dynamics Corp. Electric Boat Div., 22 BRBS 111 (1989).

The Board holds that administrative law judge properly determined that claimant, decedent's sole survivor, is entitled to weekly benefits based on 50 percent of the national average weekly wage at the time of death but because this amount, \$151.33, exceeded the statutory maximum, the Board modified the death benefit award to reflect 1/52 of decedent's average weekly wage in the 52 week period prior to retirement as mandated by Section 9(e)(2). *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

In affirming the district director's award of death benefits, the Board held that Section 9(e)(1) does not bar the application of Section 10(f) adjustments where such adjustments to death benefits would increase compensation above the employee's average weekly wage, as the maximum ceiling on death benefits is contained in Section 6(b)(1), which provides that compensation for disability or death benefits "shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage" The Board held that the "shall not exceed" phrase in Section 9(e)(1) is applicable only to the initial calculation of the base rate at which death benefits are payable, and does not act as a ceiling on the rate at which death benefits can be paid to a survivor. *Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2 (1997).

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SECTION 9(g)

Section 9(g) permits the commutation of death benefits to non-resident aliens. The Board holds that this section does not violate the Treaty of Friendship, Commerce and Navigation (FCN Treaty) between the United States and Greece. Although a similar provision of New York law was held to violate the FCN Treaty with Japan, the Board held that the treaty with Greece contains different language than the treaty with Japan; the United States is obligated to accord “national treatment” to Greek nationals only when they reside within the United States. As claimant resides in Greece, the treaty is not violated. Moreover, as treaties and statutes are accorded equal stature, the Longshore Act, which was amended after the treaty went into effect in 1954 without changes to Section 9(g), is paramount to the FCN Treaty. *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).

The Board rejects claimant’s contention that Section 9(g) is unconstitutional under the Due Process clause of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment, based on the fact that the decedent was a naturalized United States Citizen. A claim for death benefits is distinct from the right to disability benefits; claimant’s right to death benefits did not arise until the decedent’s death, and thus she is not entitled to rely on decedent’s status for constitutional protection. Aliens outside the United States are not entitled to the protection of the United States Constitution. *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).

The Board holds that the doctrine of laches does not apply to employer’s request for commutation under Section 9(g). The doctrine generally applies to the filing of an action, which this is not, and moreover, neither Section 9(g) nor its implementing regulation, 20 C.F.R. §702.142, contains a provision fixing the time in which commutation may be requested. *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).

The Board holds that the administrative law judge erred in applying the district director’s method of computing the amount of benefits to which claimant is entitled under the commutation provision of Section 9(g), in light of Section 10(f), the application of which is mandatory to an award of death benefits. The discount rate applied by the district director accounts for the present value of the lump sum payable, but it can be applied

only after Section 10(f) adjustments are taken into account in determining the lump sum. The rejection of Section 10(f) based on the difficulty in ascertaining the value of future increases in the national average weekly wage is not a valid reason for not applying Section 10(f). It is not reasonable to assume that no increases will occur, although Section 9(g) provides the district director with discretion as to the value of the future Section 10(f) adjustments. Thus, the case is remanded so that Section 10(f) adjustments may be included in the calculation of claimant's commuted death benefits. *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).